DOCUMENT RESUME

ED 096 662 CS 201 550

AUTHOR Dunn, S. Watson
TITLE The Changing Legal Climate for Marketing and Advertising in Europe.
PUB DATE Aug 74
NOTE 20p.; Paper presented at the Annual Meeting of the Association for Education in Journalism (57th, San Diego, August 18-21, 1974)

EDRS PRICE MF-$0.75 HC-$1.50 PLUS POSTAGE
DESCRIPTORS Communications; Consumer Economics; Government Role; *International Law; Journalism; Legal Problems; *Marketing; Media Research; *Publicize
IDENTIFIERS *Europe

ABSTRACT

Although advertisers and marketers can expect stronger controls in all West European countries, especially by governments, they must be alert to country-by-country differences. Political moves to the left in any country will hasten controls. Consumerism is militant in some countries, practically dormat in others. Although self regulation is strong in some countries, it is generally losing out to government regulation. Harmonization of laws advertising and its administration, though increasing, will be difficult to achieve in any meaningful terms. Successful advertisers are monitoring their markets, keeping pipelines open, putting emphasis on brands rather than on companies, following the International Chamber of Commerce Code, and avoiding paranoia and impatience with controls. (Author/TO)

U S DEPARTMENT OF HEALTH
EDUCATION & WELFARE
NATIONAL INSTITUTE OF
EDUCATION
THIS DOCUMENT HAS BEEN REPRODUCED EXACTLY AS RECEIVED FROM THE PERSON OR ORGANIZATION ORIGINATING IT. POINTS OF VIEW OR OPINIONS STATED DO NOT NECESSARILY REPRESENT OFFICIAL NATIONAL INSTITUTE OF EDUCATION POSITION OR POLICY

ED 096662

S. Watson Dunn

THE CHANGING LEGAL CLIMATE FOR MARKETING AND ADVERTISING IN EUROPE

The Norwegian Parliament passed in 1973 a bill which bans all advertising of alcoholic beverages containing 2.5% or more of alcohol. Passage of this bill threw sellers of whiskeys, gins, wines and even most beers into a state of panic since all have more than this percentage of alcohol.

Gillette officials in Britain were surprised when that country's regulatory board (Advertising Standards Authority) turned down a television commercial based on a funeral theme (burial of the old method of shaving). The Authority finally approved a revised commercial which suggested burial but with no funeral or even such accoutrements as pallbearers and hearse were shown.

These are samples of the sort of incidents which worry a good many foreign marketers in Europe and cause them to wonder how they can cope profitably with a maze of widely differing laws and regulations and interpretations of them which vary even in the somewhat homogeneous, quite prosperous countries of western Europe. In fact not all trends point toward tightening restrictions. According to the Federal German Minister of Economy, Dr. Hans Friderichs, his government planned--as of late 1973 at least--to eliminate "administrative control of advertising by the government" and to encourage self-regulation rather than legal regulation of advertising.

The contradictory trends in legislation regulating advertising in Europe, the rise of the consumer movement, the efforts of business

(To be presented at the Annual Convention of the Association for Education in Journalism, San Diego State University, August 20, 1974.)

CS 201 550

groups to find workable methods of regulating their own excesses as well as the hard-to-predict actions of the courts which interpret and the officials who administer these laws must be of concern to every multinational corporation executive. As the technological advantages and high manufacturing productivity of the United States are rapidly eroded, U.S. multinationals must depend more and more on their superiority in advertising and marketing to maintain their rate of growth. They must follow the example of such successful MNCs as Colgate-Palmolive, Unilever, Wrigley and Toyota all of which owe much of their rosy overseas profit picture to their marketing expertise. Even such industrial and technologically oriented companies as IBM, Siemens and Caterpillar depend more and more on marketing to maintain their profit position. It is no accident that the biggest growth in such service institutions as J. Walter Thompson, the world's largest advertising agency, has in recent years been in the foreign field (e.g. a slight decrease in domestic versus a growth rate of 54 percent in foreign during the past five years). Or that the world's largest market research firm, Chicago-based A. C. Nielsen Company, has been growing much faster internationally than domestically.

At the same time it is in marketing and especially in advertising that the MNC most often shows its face to the man in the streets and that it is most likely to arouse the indignation of the omnipresent critics of business around the world. Most of these critics are even more upset about foreign than domestic business activities. It is the purpose of this paper to examine some of the more pressing legal and other regulatory pitfalls of marketing and advertising in western Europe and to make some recommendations as to what can be done to cope with them within the next decade.

GENERAL TRENDS

It looks like a bull market for international lawyers who have marketing oriented MNCs as clients. This conclusion is based on two recent studies directed by the author. One was a study of the advertising and marketing strategy of 40 leading MNCs (primarily but not exclusively U. S. based). Information was solicited through mail questionnaires and interviews with executives in the U. S. and Europe and with several keen trade association and professorial observers of the international scene.* The other study was a joint University of Illinois-University of Manchester (England) project which solicited information by mail from approximately 1,100 executives in eight western European countries.**

There is a much stronger trend toward regulation of advertising and promotion in such countries as Sweden and Belgium than in Italy or Spain. In these more affluent, more marketing-oriented countries, the anti-advertising forces are more militant and better organized and they have a good deal of government support. In fact our study indicated that they also have surprisingly strong support among the men who run businesses in these countries. Unlike their counterparts in the U. S. (as indicated by a study of U. S. executives by Professor Stephen Greyser of the Harvard Business School) European executives were not particularly fearful of government control of advertising--even in Sweden where controls are quite stringent by U. S. standards. Instead, they supported strong controls over advertising.

---

*Research supported by the American Association of Advertising Agencies Educational Foundation and the University of Illinois

**Research supported by the Marsteller Foundation

European executives are especially critical of advertising which insults their intelligence, advertising which is untruthful or exaggerated and advertising directed to children. These are especially sensitive areas which any U. S. businessman marketing in Europe should monitor carefully. Although no Ralph Nader has appeared on the European scene to this time, the right leader could probably mobilize business as well as public support for stronger control of advertising in these areas. The latent support for stronger controls over business was especially noticeable in France, for example, immediately after the death of several babies due at least in part to hexachlorophene in baby powder.

Some of the differences in regulation among European countries are due to basic legal philosophy. United Kingdom, for example, is a common law country (law based on precedents and previous decisions). Most of the continental countries have a legal system based on code law (a strict and fairly literal interpretation of what is legal and what is not). For example, in common law countries, ownership of a trademark is determined by priority in use. In code law countries, ownership is determined by priority in registration.

Both University of Illinois studies showed that marketing executives expect and accept as generally desirable stronger control of advertising--not because standards of advertising practice are deteriorating but because standards of public acceptance have risen substantially.

Let us look next at some of the specifics of the changing regulatory picture in Europe. The changes appear to be taking place in three areas: legislation, administration of this legislation, and self-regulation.

LEGISLATION

Misleading Advertising

Resolution (72) 8 on Consumer Protection Against Misleading Advertising passed by the Committee of Ministers of the Council of Europe on February 18, 1972 attempted to define the areas in which advertising is likely to mislead:

> the nature, composition, origin, quantity, qualities dates of manufacture or properties of the goods or, so far as is relevant, services described by the advertisement.
>
> the total price actually to be paid by the consumer for the goods and services offered or any favorable comparison made by the advertiser with other prices.
>
> the identity, qualifications or competence of producers of goods, traders or suppliers of services.

These are an extension of Article 10 of the Paris Convention which most European countries have already ratified. However, they are so general that few marketers in any country could find serious fault with them. And that is the trouble. As soon as the negotiating gets down to specifics, each country goes its own way and tries to express its own individual style of law-making and law enforcing.

Try as it may, the Council of Europe has not had much better luck agreeing on a definition of "misleading" than have either the Federal Trade Commission or the various courts in the United States. The British Trade Descriptions Act takes a commonsense approach by emphasizing what might mislead a "reasonable person" to a "reasonable degree." This

would seem to allow some product puffery (e.g. "Coke refreshes best.") The assumption here as in the United States is that the consumer knows the message comes from a partisan source and does not take it literally.

In France whether the message is considered misleading may well depend on how the product is distributed. For example, Carter-Wallace, a large U. S. based pharmaceutical house, sells its Arrid Extra Dry deodorant through department stores but it must distribute Carter's Little Liver Pills through pharmacies, and thus bring them under France's very strict drug laws. Any seller of cosmetics can avoid regulation if he can make sure his product is not considered a proprietary drug. Penalties for false or misleading advertising are strict in France (three months to a year in prison and up to 27,000 French francs as a fine).

German laws on deception are somewhat more specific than those in other European countries. The law covers deception in both words and pictures in regard to the advertiser or his business, the qualities, origin, manufacture or price of goods or services sold, buying of the product, awards conferred on products to the persons and size of the seller's stocks. Omissions, ambiguous statements, deceptive uses of type faces or demonstrations or partly true statements are considered misleading. In Germany marketers must notify the authorities in advance if they plan to have a sale. These are limited by law to going out of business, giving up a particular line of merchandise, end-of January winter sale, end of July summer sale and one which celebrates the 25th anniversary of the institution.

Comparative Claims

European laws are generally much stricter regarding such claims than those in the United States. However, some U. S. marketers seem to

think no comparative claims are possible in Germany, but this is not quite the case. The law says advertisements must not refer to competitors either directly or indirectly "in a way that might interfere with their competitive chances." This means that you had better not say for margarine "more nutritious than butter" or for Volkswagen "more economical than other small cars" because both statements refer directly to the competition. However, Nabisco was able to say in Germany that its new snack food had "40% less fat" but it was stopped from making this claim in France which also bans many comparative claims. Any comparisons must be provably true and this cannot be the case if the same qualities are shared by competing products.

On the other hand a marketer can be much more vague in his claims of superiority if he is advertising his product or service in Italy or United Kingdom (e.g. "Coke refreshes best").

Testimonials by professionals such as doctors or dentists or by consumers cannot be used in Germany if they imply any comparison with competing products.

The right of defense is an acceptable argument for comparative advertising in France (droit de reponse) and in Italy (legittime defesa).

Information in Advertisements and Labels

The Trade Union Council in Sweden has proposed that the advertising tax should be graduated downwards in proportion to the informativeness of the advertisement. [redacted] Norwegian Marketing Law requires that certain information be provi[redacted] in advertisements and labels. When Pepsi-Cola is promoted in Germany, each advertisement must include the phrase "contains caffein." In other countries this caveat is not needed.

The European Association of Advertising Agencies objects to

requiring specific information in advertisements primarily on the basis that consumers need some kinds of information in connection with some products, other information (or very little factual information) for others. Certain media lend themselves to providing a wealth of information, certain others (e.g. television) lend themselves more to image-building. Many advertisements are most effective when they highlight one or two main points--and it is quite possible though not provable that this is most useful also to consumers. This is particularly true of the very short television commercials.

The chances are that industry regulators will try to make something of a trade in the information area--acceptance of more restrictions in labeling if media advertising is left much as it is today. The European head for one of America's largest good conglomerates speculated that the big thrust in regulation in Europe during the next ten years will come in labeling. He disagrees with the E.A.A.A. position that labeling cannot be standardized; instead he believes savings of scale will lead manufacturers to seek more standardization even if it involves more restrictions.

Classes of Products

Europe, like most areas, controls some classes of products more than others. The problem is that many of the distinctions make little sense to marketers used to special restrictions primarily for cigarettes, distilled liquors and medical products. For example, in France beverages are divided into categories according to how much alcohol they contain. In the highest category (e.g. whiskey, cognac) no advertising at all is permitted. In the case of aperitifs which have much less alcohol, one

can show the bottle, the name and address of the maker but no selling copy. In the case of medical products in France, advertising takes place only in the medical journals--never in general media.

Preemptive Claims

The Federal Trade Commission has challenged the right of advertisers in the United States to emphasize a quality or qualities which were common to all products of that same kind. The test case was Wonder Bread and the F. T. C. lost the case. In Germany the regulatory authority would have had no trouble making this claim stick. However, it is the position of the European Association of Advertising Agencies that such a claim is not "misleading" and that no such interpretation should be incorporated in the "harmonized" law for advertising in the E. E. C.

Corrective Advertising

The hue and cry over corrective advertising in the United States has aroused a lot of interest in western Europe. As a result one will find in the Consumer Protection Charter appended to Resolution 543 of 18th May, 1973 by the Consultative Assembly of the Council of Europe a provision for requesting advertisers to undertake corrective advertising if they cannot provide proof of the validity of their advertised claims. In the U. S. all cases have ended in negotiated agreements between the F. T. C. and the advertiser or its agency.

In the opinion of the E.A.A.A. the concept of corrective advertising is--in spite of the above resolution--quite alien to European law and its interpretation by European courts. When corrective advertising was debated and finally passed at the proceedings of the Consultative

Assembly, both the United Kingdom and the Swedish representative took strong exception to this provision. The British representative maintained that it would confuse consumers and may not even be seen by those who were misled by the original advertisement.

Trademarks

Chlorox has popped up around the world as Chlorex, Colrox, Whiterox, Oldrox, Corlex and Riorex. The orange and yellow bulls-eye on the Tide package has shown up as Tibe, Rido, Ipao and Ride. One packaging pirate in Greece a few years ago reproduced the package outright, including the fact on the back of the package that Tide is a registered trademark of a detergent made by Procter & Gamble in the United States. P & G, like scores of other U. S. companies uses its worldwide sales force to keep tab on such violators. As soon as they are spotted, P & G's legal department sends a warning letter, then takes the case to court if the violation continues.

Many companies have been blocked from using a valuable trade name or symbol when they enter a foreign market. After developing "Pearl Drops" as a successful entry into the highly competitive and lucrative dentifrice market in the United States, Carter-Wallace wanted to use it in England. Because Pearl soap was registered by Unilever the company was blocked from using it.

According to trademark expert, Sidney A. Diamond, major U. S. companies seeking protection for their brands in foreign markets frequently have to file in 50 to 100 countries. There are approximately 200 countries prepared to receive applications for trademark registration and to issue registration certificates if everything is in order. However, the company

looking for protection must now file a separate application in each country, in each case hiring a local attorney or agent to prepare the proper legal documents in the proper language.

Many marketers have been encouraged by the results of a conference in Vienna in June, 1973 when representatives from 50 countries adopted the text of an international trademark registration treaty that would simplify procedures for obtaining legal protection for trademarks around the world. Under this treaty one application is to be filed in a central office in Geneva. The application lists the classifications of goods or services for which the trademark is to be registered. Each government will then treat the international application as the equivalent of a local application filed directly with the proper department in that country. If approved the international registration will have the same effect as local registration. If there is a conflict with someone else's trademark, it is up to the company claiming the conflict to commence legal proceedings. Unless that happens the trademark applicant will have no need for any direct dealings with that country nor any need to engage a local attorney or agent.

The success of this treaty depends on how many countries are willing to ratify it. When five countries join the treaty, it will go into effect, but will be operative only among those five countries. However, as Mr. Diamond and others have pointed out, it is not at all certain that this treaty will be widely adopted. For one thing, there is another trademark registration arrangement in effect to which many countries (although not the U. S.) currently belong. Another reason is that certain countries

(including the U. S.) will have to make certain changes in domestic trademark laws in order to ratify the treaty. We have noted earlier the influence of common vs. code law, for example, on trademark registration in the western European countries.

Promotion

U. S. firms such as Procter & Gamble, General Foods and others have found that such time-tested promotional methods as contests, sampling, couponing, cents-off deals and others run into a host of problems and restrictions in most European countries. For instance, even where coupons could be used legally, many marketers have found that the retailers will not take them since they are afraid they will not be reimbursed by the manufacturer. The promotional picture is such a maze of regulations that the European Association of Advertising Agencies has decided that there is no real hope of harmonizing regulations even with the E. E. C. countries and has concentrated its efforts primarily on media advertising.

Premiums are a special problem in many countries. In Belgium they must be of small value and tie in with the product. Colgate found it was all right to offer towels or washcloths with their soap but they had to make sure people could buy soap without the free towel or washcloth at a price equivalent to the selling price of the soap less the cost to the company of the premium. In most countries of Europe there is some limitation on the value of the premium. In Greece Colgate was sued when it gave away razor blades as premiums with its shaving cream (not surprisingly the suit was instigated by a local manufacturer of razor blades).

Sampling is fairly simple in France but is limited in Germany.

Some companies have been stopped in using 100 percent samples there; some have not. In spite of the long tradition of government lotteries and acceptance of gambling in Europe, contests and sweepstakes offers are filled with pitfalls. In most countries it is wise to include some elements of skill as an important element in winning so the contest does not become a straight lottery. Regulations regarding two-for-one and reduced price deals vary country by country.

Several European managing directors were like the E.A.A.A., especially pessimistic regarding any success in standardizing laws on promotions. At the same time they expressed to this author their strong faith in promotions and their belief that they must occupy a major part of most consumer marketers' strategy because of the many difficulties in launching successful media advertising campaigns.

ADMINISTRATION OF THE LAWS

Any law is likely to be effective if it is administered with good sense by the various regulatory bodies and interpreted by the courts with an eye to the realities of economic life. Unfortunately for advertisers both administration and interpretation vary widely from one western European country to another. One leading European executive reported to the author that the laxity of the courts and administrative authorities provided a saving grace for foreign multinationals. He and his fellow executives have learned not to take laws too literally, but instead to check with knowledgeable lawyers. On the other hand, some reported overly strict interpretations of the laws, especially in Germany.

The natural tendency of a U. S. executive is to interpret such terms as "truth in advertising" and "comparative claims" in much the same

sense he would in the U. S. marketing world. If he followed this policy in Germany, he would probably run into trouble since that country not only has quite restrictive laws but the interpretation of these laws tends to be equally strict. If he included, for example, a fairly innocuous comparison, such as "Sleep better with...." he would probably receive an immediate cease and desist order if the courts and adminstrative authorities thought consumers might relate this comparison to his competitors. If he could prove it did not, he could probably continue to use the claim.

The administrative procedures are so diverse from country to country that the E.A.A.A. has advocated strongly that it ignore them, and that "the administrative methods be left to each country, providing they insure compliance with the rules....We cannot see that the administrative methods lie within the scope of the harmonization of trade practices."

The Advertising Association in the United Kingdom is urging the European Economic Community to go slow on harmonization. It is worried that the strict interpretation of laws regulating advertising will spread from the Continent to the U. K. It hopes instead that all E. E. C. member nations will follow the Council of Europe resolution which leaves each country free to adopt whatever mixture of legislation and voluntary regulation it desires, and that the administration of these laws and regulation be left to each individual country. The European Association of Advertising Agencies simply does not believe that the administration of laws lies within the scope of harmonization of trade practices based on Article 3(h) of the Rome Treaty of 1958 ("the approximation of the laws of Member States to the extent required for the proper functioning of the common market")

SELF-REGULATION

Self-discipline has been much more successful in some European countries than others. For example, it has worked so well in United Kingdom and Ireland that advertising and marketing people there have consequently avoided strict legal regulation. On the other hand, it is used only in borderline cases in Germany where most cases go to the courts or are settled after a cease and desist order is issued. The only E. E. C. country which does not have a self-disciplinary body of some sort is Luxemburg. However, even there advertising on broadcast media is examined by the broadcast authorities in consultation with the advertisers.

One of the big reasons why self-regulation has generally been more feasible in Europe than in the United States is the more lenient attitude toward trusts and cartels. There is no counterpart in Europe of our Sherman and Clayton Acts. Germany is the one western European country where cartel laws have caused some difficulty in self-regulatory arrangements. However, even there the ZAW (German Advertising Association) has established a self-disciplinary body which deals mainly with borderline cases.

In Holland a self-disciplinary body covers only the non-broadcast media since broadcast advertising is screened by a governmental, quasi-judicial body. On the other hand, the self-disciplinary bodies in United Kingdom and Denmark cover all media. The Danish body has on it consumers as well as lawyers. However, the Independent Broadcast Authority in the United Kingdom examines all commercials before publication in consultation with the advertiser or the agency involved. One large American

pharmaceutical firm wanted to use the same commercials in U.K. which had worked so well in the United States, but was turned down by I.B.A. The company decided to do some testing of the proposed copy before deciding whether to contest the decision, and found that the copy was not particularly effective anyway, and that an alternate approach might be even more effective.

The Advertising Association in the U. K. argues that no method of statutory control can be as effective as that country's system of self-regulation. In answering the Labour Party which wants stronger legal regulation the A. A. says:

> No system works perfectly; there is a constant need for watchfulness and new decisions to meet new challenges. Certainly the statutory systems on the evidence of other countries work far less perfectly. However, it is manifestly untrue to call the control (the U.K. system of self-regulation) 'negative.' It carries a powerful, positive and instant sanction of non-publication in all effective media of any advertisement which offends the British Code of Advertising Practice. This is a far quicker-acting system to stop dishonest advertising than one based on law courts, government departments, injunctions and other legal paraphernalia of a statutory system with its cumbersome and ineffectual processes.

However, the International Advertising Association admits in its 1973 brochure, The Global Challenge to Advertising, that time is not on the side of self-regulation. Pressure is mounting in most countries for

more and stronger legal regulation. The public's innate suspicion of business is likely to be transferred to its attempts to regulate itself--especially of any activity so productive as advertising and so open to public view.

CONCLUSION

Although business chafes at any increase in regulation, the chances are that regulations of all sorts will escalate during the coming decade. The real problem is to determine how business can operate most efficiently in a climate of increasing control around Europe.

The more progressive companies in Europe have come up with a variety of approaches to cope with creeping legalism and the probable rise of consumerism. Only in the Scandinavian countries could one say that consumerism has reached the level it has in the United States. Yet few businessmen in Europe doubt that latent criticism of business could be mobilized in a hurry if a Ralph Nader came along to call them to the colors. And even if one does not, the same thing is inevitable--it will just take a bit longer.

Controls seem to come with material progress. It is no accident that the strictest controls over advertising and marketing take place in the country with the highest per capita income in Europe--Sweden. Or that conversely relatively poor countries like Spain and Greece have little in the way of controls. And what controls they have are not enforced with the same vigilance as those in Sweden and Germany, for example.

The more astute of the MNCs seem to be taking such steps as the following to cope with the rise of regulation:

1. Monitoring the market to find out whether there is real grassroots support for more regulation of advertising and marketing. If there is, they, of course, will take the anti-business speeches a lot more seriously.

2. Keeping up to date with the changes in laws, and proposed

laws, the administration of these laws. This seems obvious but is easy to overlook in the face of so many other day-by-day fires to put out. One of the more optimistic U. S. multinationals thinks that the important thing to watch is how these are administered. At least some executives of this firm think flexibility of enforcement is the wave of the future and they caution paranoia about new and proposed legislation. One other leading multinational does its monitoring of regulations and their administration through a team of executives which works with the government and trade association officials and with consumer groups. The managing director of this firm (the dominant food company in one product group in several western European countries) claims this procedure has worked well, and they they have established good rapport with these groups.

3. Put the emphasis on brands rather than on companies. This might seem to go against the trend to build favorable corporate images. However, some executives in Europe feel that people become less upset about brands than about corporations.

4. Following the International Chamber of Commerce Code of advertising practice. It provides a good guide and serves as the major model for the harmonization of the EEC Council of Europe conferees.

5. Not expecting harmonization day after tomorrow. Progress is likely to be especially slow in the promotions field, and even in media advertising is likely to be confined mainly to fairly general rules or guidelines.

It is worth noting in conclusion that both studies indicated that the modern western European businessman does not seem particularly discouraged by the maze of regulations and the often difficult-to-predict

administration of them. He is sanguine about them as he is about the many other difficulties he confronts every day in western Europe. Most seem to be optimistic about the future and like the coaches of winning football teams seem to enjoy the contest of trying to understand the rules of the game and then play a winning ball game while working within them.

****